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AUTHOR	Zirkel, Perry A.
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ABSTRACT

Defamation is a common-law claim for liability that encompasses "libel," which is the written form, and "slander," which is the oral form. School principals can be plaintiffs or defendants in defamation suits. Relevant case law provides illustrations of the various elements of defamation for both roles of the principal. Court decisions involving other school officials, such as superintendents, are included to provide a more complete administrative picture. Unlike lawsuits based upon alleged constitutional violations, defamation suits may be brought against private and public school administrators alike. Advice is offered principals and other administrators regarding their conduct in potential defamation litigation both as plaintiffs and/or defendants. (MLF)

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A Legal Memorandum

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Defamation of and By Principals

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Defamation is a common-law claim for liability that encompasses "libel," which is the written form, and "slander," which is the oral form. Although it varies in its refinements from state to state, defamation generally consists of the following elements:

- Identification of the victim or plaintiff
- Statements harmful to this individual's reputation (referred to as "defamatory matter")
- Dissemination to at least one third party (referred to as "publication").

Proof of specific damages is also required unless the offending words are slander or libel "per se," such as an attack on one's occupation or profession.

The primary defenses against a claim of defamation are truth, absolute or qualified privilege, opinion, and—in some states—governmental or official immunity. "Cousins" to defamation are invasion of privacy, which is applicable even when the offending words are true, and procedural due process, which is triggered by serious, concrete harm to reputation.

The qualified privilege defense also has both common-law and constitutional components. The common-law qualified privilege, which is enjoyed by the various participants within the educational process, including parents as well as principals, requires the plaintiff to show malice or ill will by the defendant.

The constitutional privilege, which the Supreme Court established in *New York Times* v. *Sullivan* (1964), is applicable when the plaintiff is a public official or a public figure. This constitutional conditional privilege requires the plaintiff to show, by clear and convincing evidence, "actual malice," which is willful or reckless disregard of the truth, by the defendant.

Finally, the common-law absolute privilege applies to the judiciary and legislature as well as to agencies like school boards when acting in a quasi-judicial or legislative capacity.

School principals can be plaintiffs or defendants in defamation suits. If the person who utters or writes the offending words is the principal, as in a teacher evaluation, the principal may become a defendant in a defamation suit. If the person who is the target of the offending words is the principal, as when criticized by a disgruntled staff or community member, the principal might become the plaintiff in a defamation suit.

Relevant case law provides illustrations of the various elements of defamation for both roles of the principal. Court decisions involving other school officials, such as superintendents, are included to provide a more complete administrative picture.

It should be noted that, unlike lawsuits based upon alleged constitutional violations, defamation suits may be brought against private and public school administrators alike.

Defamation of Principals

Public Figures and Public Officials

In defamation cases where the principal or other administrator is the plaintiff, or suing party, a threshold issue often is whether the particular administrator is a public official or a public figure; if so, as summarized above, the odds of winning the suit are lower, because the principal has the added burden of clearly and convincingly proving actual malice on the defendant's part.

In most cases the courts have answered that the principal qualifies as a public figure, if not a public official. In *Kapiloff* v. *Dunn* (Md. App. 1975), for example, the court ruled that "as a high school principal . . . [the plaintiff]

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was within the public figure/public official classification," and set aside a large verdict in his favor. He lost his suit against a newspaper that had rated him as "unsuitable," because he did not clearly and convincingly prove that the newspaper knowingly or recklessly disregarded the truth in publishing this description.

In *Reaves* v. *Foster* (Miss. 1967), the court similarly reversed a $60,000 verdict that had been in favor of a black principal. He sued members of a community organization who had published a pamphlet characterizing him in a cartoon as a puppet and ventriloquist's dummy for the superintendent of schools and as an "Uncle Tom," or betrayer of his race. The court ruled: "Under the doctrine of fair comment, a man occupying a prominent position, public or quasi-public in nature, is subject to severe criticism, and malice is not presumed but must be proved."

It should be noted that, unlike lawsuits based upon alleged constitutional violations, defamation suits may be brought against private and public school administrators alike.

More recently, in *Stevens* v. *Tillman* (7th Cir. 1988), a federal appellate court reversed the judgment rendered against the members of the advisory council of a predominantly black elementary school. In staging a sit-in and organizing a student boycott against the principal, who was white, the council members referred to her as a racist and made disparaging statements regarding her administrative competence. The jury found the statements defamatory and awarded her nominal damages, but the appellate court ruled that the principal was a public official and thus was subject to the higher standard of proof, because the statements dealt with the way she handled her job, not her private life.

If principals are regarded as public officials or public figures, superintendents qualify as such even more clearly. For example, in *Dow* v. *New Haven Independent, Inc.* (Conn. Super. 1987), the court had little trouble reaching the conclusion that the superintendent qualified as a public official and thus had the burden of proving actual malice by the defendant-newspaper.

Even where the principal or other administrator does not qualify as a public official or as a public figure, generally, he or she may well qualify as a "limited public figure" (i.e., one who thrusts himself, or is thrust, into the limelight), thereby triggering the same constitutional privilege.

To illustrate, in *DiBernardo* v. *Tonawanda Publishing Corp.* (N.Y. App. Div. 1983), an administrator for buildings and grounds sued a newspaper that had alleged political influence and manipulation in his appointment. The appeals court ruled that he was not a public official but that, because he was thrust into this controversy he was a limited public figure. Thus, the court remanded the case for the jury to determine the issue of actual malice.

A minority of courts, however, have accorded neither public official nor public figure status to some, usually special administrative positions. For example, in *McCutcheon* v. *Moran* (Ill. App. 1981), the court concluded that a principal who had been accused by a school janitor of battery, was not a public figure. The court, however, reasoned broadly that "[t]he relationship a public school teacher or principal has with the conduct of government is far too remote . . . to justify exposing these individuals to . . . assault upon his or her reputation." However, its conclusion in this case was likely attributable to the specific facts of the case; the plaintiff had the dual role of principal and teacher at a small elementary school.

Similarly, the plaintiff's role was factually different from the general position of principal in *Ramirez* v. *Rogers* (Me. 1988), where the court ruled that the operator of a private gymnastics school was not a limited public figure at the time that a competitor accused him of being the target of a child abuse investigation. Although the accusations soon thereafter put him in the television spotlight, the court regarded the time of the accusations as the measuring point, thus upholding the award of compensatory and punitive damages for slander per se.

When a court concludes that the plaintiff is a public figure, the burden of proof is high but not insurmountable. For example, in *O'Neil* v. *Peekskill Faculty Association* (N.Y. App. Div. 1989), the plaintiff labor lawyer, who was the school district's chief negotiator, won $130,000 in compensatory damages and $300,000 in punitive damages against the teachers' union for issuing, with knowing or reckless disregard of the truth, a press release falsely accusing him of uttering a racial slur during contract negotiations.

Common-Law Privileges

Less frequently in defamation suits by principals or other administrators, the defendant is entitled to a measure of protection due to privileges that are derived from the common law rather than from the Constitution. Sometimes the privilege is qualified.

For example, in *Schulze* v. *Coykendall* (Kan. 1970), a parent presented a written complaint to the school board

that the principal had disregarded his duties and was unfit for office. The principal sued the parent for libel, but the court held that the parent was entitled to a qualified privilege, requiring the principal to prove that the statement was made maliciously.

Sometimes, as when the defendant is speaking in a judicial or legislative proceeding, the privilege is absolute. For example, in the aforementioned *McCutcheon* case, even though the janitor was not entitled to the qualified protection of the public figure doctrine, the court held that his statement was absolutely privileged because it was made to the school board, a quasi-judicial body.

Similarly, in *Brody* v. *Montalbano* (Cal. App. 1979), an assistant principal sued parents for statements in their complaint to the board about his disciplining their son. Ruling that the parents' statements were absolutely protected because the board was acting in a quasi-judicial capacity, the court explained: "Underlying the absolute privilege is a recognition of the importance of providing utmost freedom of communication between citizens and public authorities whose responsibility is to investigate wrongdoing."

Both privileges may interlock, depending on the context and scope of underlying authority. For example, in *Sullivan* v. *Eastchester Union Free School District* (N.Y. App. Div. 1987), the school board, which had philosophical differences with an admittedly praiseworthy principal, brought charges against him when he refused to resign. He sued the board members for defamation, alleging that they had falsified the instances of wrongdoing cited in the charges and that they had spread false rumors that he had been involved in an affair with an associate, that he had used student funds for his own benefit, and that he had used subordinates to perform work on his home during school hours.

The appellate court upheld the trial court's refusal to dismiss his suit, ruling that although the school board members had an absolute privilege for their statement of charges, they had only a qualified privilege for the related statements that they had made outside the scope of their judicial authority. Thus, the case was remanded for a jury trial.

In summary, a good statement on privilege in the school context was offered by the court in *Martin* v. *Kearney* (Cal. Ct. of App. 1975):

> We do not intend to suggest that privilege attaches to every libel of a public school teacher or administrator .... But [where] parents of school children ... seek redress ... through appropriate channels ... [it is] one of the crosses a public school teacher [or administrator] must bear since the law compels parents to send their children to school, appropriate channels for the airing of grievances against the operation of the school system must remain open.

Opinion

One of the most difficult defenses against defamation to define is that the statement in question is purely one of opinion instead of fact. Unlike the common law privileges, this defense is rooted in the Constitution. Comparing opinion with false statements of fact, the Supreme Court declared in *Gertz* v. *Welsh* (1974): "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." But, the lower courts have generally interpreted these words with limitations that have led to not entirely predictable results. As the Seventh Circuit concluded in the aforementioned *Stevens* decision, with some overstatement for emphasis: "Ever since [*Gertz*], the courts have wrestled with the question, 'what's an opinion?' and have come up with buckets full of factors to consider but no useful guidance on what to do when [the factors point in] opposite directions, as they always do."

When a court concludes that the plaintiff is a public figure, the burden of proof is high but not insurmountable.

Indeed, the courts are divided on this issue. The *Stevens* court ostensibly ducked the constitutional question by applying the common-law majority view that when a statement of opinion discloses the facts on which the opinion is based or they are commonly known or readily accessible, it is protected. The defendants' characterization of the principal as a "racist" here was not actionable because it did not in this case imply the existence of undisclosed defamatory facts.

Similarly, in *Dow* v. *New Haven Independent, Inc.* (Conn. Super. 1987), the court held that statements in a newspaper editorial criticizing the superintendent for his position on AIDS and for his demand of an advance deposit of $20,000 before he would allow a reporter to review his official correspondence were pure opinions, because they stated the supporting facts or these facts were readily known. Therefore, this court regarded the statements as protected by the First Amendment. Even if the statements were not pure opinion, the court reasoned, they met the multi-factored test for protected mixed opinion. The court concluded, "the language in the editorial in this

does not make it libelous under the law."

Illustrating other variations on this theme, New York's appellate courts in the previously mentioned *DiBernardo* and *O'Neil* decisions ruled that opinion is protected where it sets forth the supporting facts except, respectively, where it charges criminal conduct or where the supporting facts are false.

Illustrating a final twist, *Kapiloff*, also mentioned above, regarded opinion based on false facts as subject to the conditional, constitutional privilege when dealing with a public issue or figure.

Governmental Immunity

Where the principal or other administrator is suing the board or other school officials, the defense of governmental or official immunity may also be applicable in some jurisdictions. For example, in *Lipman* v. *Brisbane Elementary School District* (Cal. 1961), the superintendent sued the school board and other local officials for slander. They had accused her of engaging in shady dealings, receiving kickbacks, and being dictatorial.

The trial court dismissed the suit based on governmental immunity, but the appellate court reversed and remanded the case for trial, ruling that in that jurisdiction, this immunity applies only to discretionary acts within the scope of the officials' authority. Here, the protection applied to the statements made to the district attorney and county superintendent, but not to those made to the press and members of the public that went beyond the report of the charges.

Defamation by the Principal

Common-Law Privileges

Where the principal or other administrator is the defendant rather than the plaintiff in a defamation suit, the most important factor is often the qualified privilege enjoyed by those participating in the education process. For example, in *McGowen* v. *Prentice* (La. App. 1976), the principal had recommended to the school board that the plaintiff-teacher not be rehired, referring to her as a "nut." The court held that the recommendation was not defamatory in this case because it was reasonably understood here to be in light jest. But even if it had been defamatory, the statement was regarded as conditionally privileged: "A good faith communication between parties sharing an interest or duty (here, providing good teachers in public schools) enjoys a [qualified] privilege against suit for defamation in Louisiana."

Similarly, in *Puckett* v. *McKinney*, (Ind. App. 1978), a teacher sued the principal for asserting in his nonrenewal recommendation to the board that she was emotionally disturbed. Again, the court found the qualified privilege applicable, explaining that "a communication is protected as privileged if made in good faith upon a subject in which the communicating party has a duty and is made to a party having a corresponding duty." The teacher lost the case because she failed to prove malice, such as excessive publication. In *Manguso* v. *Oceanside Unified School District* (Cal. App. 1984), the defendant was the superintendent but the qualified-privilege invoked applies to principals as well.

In response to a request for a confidential letter of recommendation for a teacher's placement file, the superintendent included these statements:

> [Mrs. M] taught in the school of this district from September, 1954, to June, 1956. . . . [I]n her early experience she was a better than average teacher. . . . [H]owever, during her last year she suffered from headaches, spells of depression, and other nervous symptoms which necessitated her absence from the classroom for varying intervals. She is thoroughly groomed in fundamentals of teaching. . . . Her peer relationships have been fair. Since leaving the district, she taught in a neighboring community where she was a source of great difficulty. Details of this matter can be obtained from William F— [superintendent of] Fallbrook Union School District.

Mrs. M obtained a copy of the letter and sued him for libel. But the administrator won because Mrs. M did not prove, by a preponderance of the evidence, that his statements were not only false but also that he wrote them with ill will toward her or at least without a reasonable belief in the truth of his statements at the time he wrote them.

Sometimes, depending on the circumstances and the jurisdiction, the administrator's statement is absolutely privileged. For example, in *Sobel* v. *Wingard* (Pa. Super. 1987), a substitute teacher sued the principal for sending him a letter that his services would no longer be required due to failure to follow administrative policies. The appellate court affirmed the dismissal of this libel action, ruling that the statements in the letter were not defamatory but that, even if they had been, the statements were absolutely privileged because they were part of the principal's evaluation duties.

This absolute privilege is more frequently applicable in cases where the defendant is the superintendent. In the early case of *Williams* v. *School District of Springfield* (Mo. 1969), the court ruled that the superintendent's statement to the board that the teacher had been insubordinate was

absolutely privileged. Likewise, in *Swann* v. *Caylor* (Ala. App. 1987), a teacher sued the superintendent for a letter sent to the teacher initiating termination proceedings. The court affirmed summary judgment for the superintendent, finding no evidence of publication and, even if this requirement had been met, ruling that the letter was a privileged communication sent at the direction of the board.

Similarly, in *Agins* v. *Darmstadter* (N.Y. App. Div. 1989), a teacher sued the superintendent for statements made to district personnel and a postal inspector in the investigation of threatening letters that the superintendent had received and believed were from the teacher. The court ruled that the statements were privileged because they were uttered in the course of her legal duties.

Sometimes both a qualified privilege and an absolute privilege apply. An illustration of where the line is drawn between these two privileges is *Santavicca* v. *City of Yonkers* (N.Y. App. Div. 1989), in which a former football coach sued the superintendent for oral and written statements that she made about the death of one of the team members. The court held that the superintendent, as a high administrative officer, was entitled to an absolute privilege for the statements made during the discharge of her duties and that she also had a qualifed privilege for the statements made to the press.

Opinion

As in the case of privilege, opinion may also be invoked as a defense when an alleged defamation is made *by* the administrator, just as when it is against the administrator. Thus, in *True* v. *Ladner* (Me. 1986), a former teacher sued the superintendent and the board regarding their response to the inquiry from a prospective employer.

In this case, however, the court rejected the opinion defense because the statements at issue implied undisclosed defamatory facts. Similarly, the court rejected governmental immunity because, under Maine's law, discretionary acts are not protected where they are not part of the statutory duty of the school officials. Finally, the teacher won the judgment because although a qualified privilege applied, the teacher had proven malice on the defendants' part.

Governmental Immunity

As demonstrated by the *True* decision, depending on the jurisdiction, governmental and official immunity may be applicable when the principal or other administrator is the defendant. For example, in *Bego* v. *Gordon* (S.D. 1987) a teacher sued the superintendent for remarking in the presence of students, during a classroom observation, that the teacher didn't care whether they learned or not. The appellate court remanded the case for trial, ruling that there was a genuine issue of material fact as to whether the statement was within the scope of official authority and thus covered by that jurisdiction's immunity. The remark would be protected if made to promote discipline, but not if actuated by malice.

Defamation of and by Administrators

In some defamation cases, administrators are on both sides of the courtroom table. In these cases, the same elements and defenses are illustrated.

Illustrative of the common-law privileges, in *Supan* v. *Michelfeld* (N.Y. App. Div. 1983), the school district's business administrator brought a slander action against the superintendent and the board for accusing him, in an executive session, of dishonesty and deceiving the board into believing he was certified. The court ruled that the defendant officials were absolutely privileged for the statements made in discharging their responsibilities but that this protection did not extend to their re-publication of the charges to outside organizations.

Similarly, in *Grostick* v. *Ellsworth* (Mich. App. 1987), an elememtary principal sued the superintendent after a negative evaluation, alleging that the superintendent libeled him in written documents that communicated the evaluation to the school board and that the superintendent slandered him in reading and discussing these letters at the board meetings. The court rejected the superintendent's claim of absolute privilege, reasoning that he was not acting in a judicial or legislative capacity when communicating the evaluation to the board. However, the court ruled that he was entitled to a qualified privilege, thus leaving the issue of malice to the jury.

Governmental immunity was the basis for the judgment in *Buckner* v. *Carlton* (Tenn. App. 1981) for the assistant principal and the superintendent. A former principal unsuccessfully brought a defamation suit against them for bringing charges against him.

Finally, illustrating several defenses, in *Malia* v. *Monchak* (Pa. Commw. 1988), an assistant principal sued the principal, the superintendent, and board members in relation to his evaluation and termination. The court ruled that the principal's statements that he was "inept," "insubordinate," and "inattentive" were privileged because they were made pursuant to the principal's statutory duties.

The privilege would have been absolute but the exception for wilful misconduct in the state's government/official immunity statute reduced this privilege to a quali-

fied immunity. The case was dismissed against the principal because the plaintiff assistant principal had not alleged, much less proven, malice. The case was also dismissed against one of the board members; his statements following the termination hearing were pure opinion because they stated the facts on which his opinion was based. However, the case against another board member was remanded for trial because his statements were reasonably understood to imply undisclosed underlying facts.

Summary

Principals and other administrators are bound, in doing their jobs, to enter the orbit of potential defamation litigation both as plaintiffs and/or defendants. The large number of court decisions reveals the likelihood of such actions arising, but the results of slander and libel suits by and against school administrators indicates the difficulty in winning these cases.

As potential plaintiffs, they need to have or develop thick skin. First, they must be able to prove each of the elements of defamation, such as identification and publication.

Second, they are likely in many cases to be regarded as public figures, whether limited or general, or as public officials, thus erecting the constitutional hurdle of having to prove, with clear and convincing evidence, that the defendant(s) wilfully or recklessly disregarded the truth.

Third, even in the few cases where this Constitution-based qualified privilege does not apply, the defendants most likely have a conditional privilege based on common law. The educational process invites and requires criticism, warranting a protection even for false and damaging statements if the intent is not malicious.

Fourth, where the defamation arises within the school board's quasi-judicial functions, an absolute, common-law privilege applies.

Fifth, if the defamatory statements are opinion, they may be protected depending on the jurisdictional interpretation of what constitutes opinion.

Finally, if the board and/or school officials are the defendants, depending on the jurisdiction, governmental immunity may provide a barrier. Thus, before filing suit for slander or libel, think at least twice and consult counsel as to the specifics of defamation law in your jurisdiction.

Conversely, while they are potential defendants, principals and other administrators should not be overly worried about threatened defamation suits. In performing their statutory duties, such as evaluation, they are clothed with a common-law privilege. The defenses of opinion and governmental immunity add varying degrees of additional protection. Thus insulated, you should do your job vigorously but prudently; don't shirk your duties, but act reasonably in what you state orally and in writing and to whom you state it. Such actions, in good faith, rather than with malice, will provide ample protection.

Criticism of and by principals at times must be, in the words of the *Dow* decision, "vehement" and "unpleasant"; it is the nature of the vibrant marketplace of ideas and forum of the community that our public schools are and must be. Do your job with vigor and reason, without being paralyzed by threats of—or preoccupied with threatening —a defamation suit.

This Legal Memorandum was written for NASSP by Perry A. Zirkel, University Professor of Education and Law, Lehigh University (Bethlehem, Pa.)

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